

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2068-CR

Cir. Ct. No. 2015CF159

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL L. CHRISTENSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Darryl Christensen pled guilty to five counts of sexual assault by a correctional officer. He then sought to have postconviction

counsel appointed for him at public expense. The Office of the State Public Defender (SPD) found him financially ineligible for appointed counsel. The circuit court appears to have affirmed the SPD's determination, and it also denied Christensen's motion to have an attorney appointed for him at county expense. We affirm the circuit court's determination in all respects. The record does not indicate how the SPD reached its financial ineligibility conclusion, and we therefore assume the circuit court's decision affirming that conclusion was correct. We also conclude the circuit court properly exercised its discretion in declining to invoke its inherent authority to appoint counsel for Christensen at county expense.

BACKGROUND

¶2 The State filed a criminal complaint accusing Christensen, a Polk County corrections officer, of having sexually assaulted several female inmates. Christensen filed an indigency petition seeking the appointment of counsel. The circuit court granted the petition and appointed a private attorney for Christensen at county expense. The court required Christensen to reimburse the county at a rate of \$100 per pay period until the total cost of the representation had been paid.¹

¶3 Christensen ultimately pled guilty to the five counts charged pursuant to a plea agreement. He received consecutive sentences totaling sixty years, consisting of thirty years' initial confinement and thirty years' extended supervision.

¹ Christensen represented in the petition that he was employed and grossing \$520 weekly.

¶4 Christensen's appointed attorney filed a notice of intent to pursue postconviction relief. The form had a section that asked whether the defendant's financial circumstances have or have not improved since the initial indigency determination. Neither box was marked on the notice form.

¶5 At some point, Christensen's appointed attorney ceased representing him, and Christensen contacted the SPD seeking to have postconviction counsel appointed for him. The SPD denied Christensen's request after Christensen had failed to respond to the SPD's requests to verify his income and expenses. Afterward, Christensen apparently submitted some documentation, and the SPD denied his request on the basis that the eligibility form he submitted failed to establish that he met the financial eligibility criteria for an SPD appointment. The documentation Christensen filed with the SPD is not part of the appellate record.

¶6 Christensen subsequently filed a motion in this court requesting that we appoint counsel to represent him in his appeal. We denied this motion, observing that a defendant may obtain counsel at no expense in either of two ways. The first is through an SPD appointment under WIS. STAT. ch. 977 (2015-16).² We noted that if Christensen wished to obtain review of the SPD's determination denying him appointed counsel, he would have to file a motion in the circuit court under WIS. STAT. § 977.06(4). We also observed that, having been deemed ineligible by the SPD for appointed counsel, Christensen could request that the circuit court exercise its inherent authority to appoint counsel for

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

him. *See State v. Dean*, 163 Wis. 2d 503, 512-13, 471 N.W.2d 310 (Ct. App. 1991).

¶7 Following our order, Christensen sent a letter to the circuit court requesting appointed counsel at public expense. Christensen stated he did not have the funds to hire private counsel, as he and his wife had divorced subsequent to the offenses and she had “received everything,” including the house, vehicles, bank accounts, and half of Christensen’s pension. Christensen represented that he received \$1148 per month from his pension, but he was left with only \$48 per month after accounting for \$1100 in monthly child support payments. Christensen also filed an affidavit of indigency that was consistent with these representations regarding his income and expenses. Christensen requested that the circuit court review the SPD’s indigency determination, and he later filed a motion requesting that the circuit court appoint postconviction counsel for him at county expense.

¶8 The circuit court acknowledged receiving Christensen’s “request for post[-]conviction counsel at the public’s expense,” but it declined to appoint counsel.³ The court represented it had reviewed Christensen’s divorce file and the divorce judgment, which revealed that Christensen did not contest the divorce and agreed that his ex-wife should receive all marital property.⁴ The court stated the only provision in the divorce judgment relating to Christensen was a provision

³ The order was in the form of a letter. Christensen subsequently filed in this court a petition to file an interlocutory appeal. We denied the petition, noting the circuit court’s determination constituted a final order appealable as a matter of right.

⁴ Christensen’s divorce file, which was also litigated in Polk County, is not contained in the appellate record. CCAP entries for Polk County Circuit Court Case no. 2015FA219 show the divorce was filed on November 9, 2015, and was resolved by a pretrial settlement and stipulation on May 27, 2016.

obligating him to reimburse Polk County for the costs of his previously appointed attorney, for which he had not made any payments. The court was of the opinion that Christensen had voluntarily impoverished himself to avoid reimbursing Polk County. Christensen now appeals pro se.

DISCUSSION

¶9 A criminal defendant’s constitutional right to counsel does not depend on his or her financial well-being. *See State v. Kennedy*, 2008 WI App 186, ¶9, 315 Wis. 2d 507, 762 N.W.2d 412. As stated above, there are two methods for an indigent criminal defendant to obtain counsel at the public’s expense. *See id.*, ¶10; *see also supra*, ¶6. In either seeking review of the SPD’s indigency determination or invoking the circuit court’s inherent authority to appoint an attorney, “[t]he criminal defendant has the burden of proving that he/she is unable to afford counsel by a preponderance of the evidence.” *Kennedy*, 315 Wis. 2d 507, ¶9 (citing *State v. Buelow*, 122 Wis. 2d 465, 472, 363 N.W.2d 255 (Ct. App. 1984)).

¶10 Christensen first argues the circuit court erred because, in his view, the court failed to specifically rule on his request for review of the SPD’s indigency determination. WISCONSIN STAT. § 977.06(4), however, suggests that a circuit court need not conduct a review of the SPD’s determination merely because a defendant requests it. Rather, in using the permissive term “may,” the statute appears to confer discretionary review authority. This interpretation is bolstered by the fact that the statute uses the mandatory term “shall” in the same sentence to describe a circuit court’s review obligations upon the motion of the district attorney or the state public defender. *See* § 977.06(4)(a). The statutory language suggests that, contrary to Christensen’s argument, the court was not required to

indulge Christensen's request for review, let alone explain the reasons for its decision.

¶11 Regardless, we conclude the circuit court's general determination that Christensen was not eligible for publicly funded representation was effectively a determination that the SPD did not err in its indigency determination.⁵ The scope of a circuit court's review under WIS. STAT. § 977.06(4) is limited to an examination of the SPD's application of the legislative criteria and the accompanying mathematical calculations.⁶ *Dean*, 163 Wis. 2d at 511. These legislative criteria consist of the rules promulgated by the public defender board under WIS. STAT. § 977.02(3) and the system established under § 977.06. *See* WIS. STAT. § 977.07(1)(a). The public defender board has promulgated detailed regulations, *see* WIS. ADMIN. CODE §§ PD 3.02-.03 (Jan. 2014), but "[i]n general, the assessment involves a calculation of whether a person's liabilities are greater than his/her assets," *Kennedy*, 315 Wis. 2d 507, ¶12.

¶12 Christensen's letter to the circuit court expressed befuddlement at how the SPD could deny him appointed counsel when his wife had received all

⁵ On this point, we note the circuit court letter used the phrase "post[-]conviction counsel at the public's expense," which can describe both SPD appointments (which are generally paid out of funds allocated to the SPD by the state) and circuit court appointments at the county's expense.

⁶ Christensen appears to argue he is entitled to de novo appellate review of the circuit court's review of the SPD's indigency determination. The State responds that our review must utilize the "clearly erroneous" standard. Each is partially correct. While we will not set aside the circuit court's findings of fact vis-à-vis a defendant's financial means, the ultimate question of whether a defendant is constitutionally entitled to representation is a question of law. *See State v. Kennedy*, 2008 WI App 186, ¶11, 315 Wis. 2d 507, 762 N.W.2d 412; *State v. Buelow*, 122 Wis. 2d 465, 470, 363 N.W.2d 255 (Ct. App. 1984).

assets in the divorce and he had “no funds to hire an attorney.” Yet, the appellate record does not contain—and Christensen does not appear to have submitted to the circuit court—any of the documentation he apparently filed with the SPD.⁷ Thus, there is nothing in the record revealing SPD’s specific calculation, what numbers it used, or how it reached its financial ineligibility conclusion. It was Christensen’s responsibility to ensure that all information necessary to substantiate his claim was before the circuit court. *Id.*, ¶¶24, 29. “Without that information in the record, we assume that the trial court’s determination, based on the SPD’s calculation[,], was correct.”⁸ *Id.*, ¶24.

¶13 Christensen also argues the circuit court erred by not exercising its inherent authority to appoint him counsel after he was denied an SPD appointment. “The inherent authority of the circuit court is not intended to replace the SPD appointments. Rather, it is intended to cover those circumstances where a defendant does not satisfy the legislatively created SPD criteria for appointment, but still demonstrates indigency.” *Id.*, ¶28.

¶14 In determining whether to exercise its inherent authority to appoint counsel, the circuit court must consider whether the necessities of the case, the

⁷ The affidavit of indigency Christensen filed with the circuit court postdated the SPD’s ineligibility determination.

⁸ The State presents an argument for affirming the SPD’s determination on the merits, noting, among other things, that the SPD is required to base the indigency determination on the applicant’s gross income without accounting for expenses such as child support. *See* WIS. ADMIN. CODE § PD 3.03(1), (3) (Jan. 2014). Christensen, however, counters that the State uses the incorrect federal poverty guideline for a household of one, asserting that he actually has three dependent minor children. We need not independently decide whether the record materials demonstrate indigency under the SPD rules because the absence of any record support regarding how the SPD reached that determination is dispositive. *See Maryland Arms Ltd. P’ship v. Connell*, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15.

demands of public justice, and sound policy require the appointment in order to safeguard the defendant's constitutional right to counsel. *Id.*, ¶10. Whether a defendant has provided the circuit court with sufficient facts to warrant the appointment of counsel using its inherent authority is a discretionary decision for the court. *Id.*, ¶17. We will uphold a circuit court's exercise of discretion if the court applied the proper law to the relevant facts and reached a conclusion that a reasonable judge could reach. *Siker v. Siker*, 225 Wis. 2d 522, 527, 593 N.W.2d 830 (Ct. App. 1999).

¶15 Christensen argues the circuit court's decision was not supported by the facts of record. We disagree. The allocation of the burden of proof on the party asserting indigency recognizes that party as the one who possesses the facts necessary to explain why he or she is unable to retain private counsel. *Kennedy*, 315 Wis. 2d 507, ¶29. Yet Christensen's submissions were short on pertinent information. The only material Christensen provided to the circuit court in support of his motions was an affidavit of indigency, in which he merely represented he was entitled to receive \$1148 in monthly pension payments but needed to pay \$1100 in monthly child support. The circuit court, in reviewing Christensen's divorce file, apparently could not substantiate Christensen's representation regarding his child support obligation.⁹ Moreover, Christensen's affidavit did not contain any information regarding his attempts to retain private counsel, which is information the circuit court must have. *See Dean*, 163 Wis. 2d at 514-15.

⁹ The circuit court's decision appears to question whether a child support obligation existed at all, as it noted the only payment obligation Christensen appeared to have based on the divorce documents was his required reimbursement to the county for his earlier-appointed attorney.

¶16 Christensen argues it was error for the circuit court to consider his divorce file. However, Christensen had himself raised the issue of the divorce in his letter to the court, citing it (and the resulting property division and alleged child support order) as a primary reason for his professed indigency. A circuit court considering whether to exercise its inherent authority to appoint counsel “cannot restrict itself to the criteria mandated by the legislature” for SPD appointments. *Dean*, 163Wis.2d at 514. Rather, the court “should consider all relevant evidence presented by the defendant that is material to the defendant’s present ability to retain counsel.” *Id.* Christensen obviously believed the divorce proceedings were relevant to his ability to afford counsel, yet he failed to supply his divorce judgment to the court. Under these circumstances, we cannot conclude it was error for the court to obtain the file on its own initiative.

¶17 Christensen also argues that even if he had contested the divorce, there were no assets or funds in the marital estate from which he could have paid for an attorney. However, even Christensen’s unsworn letter to the court conceded that his ex-wife had been awarded items of potential value, including their house, vehicles, and bank accounts. Christensen now argues these items had only nominal value, but he provides no record citations for this assertion.¹⁰ Regardless, by citing his divorce as the reason for his indigency, Christensen could reasonably have expected the circuit court to make some inquiry into these matters, yet

¹⁰ Our review of the record shows some evidence to support Christensen’s claim of nominal value. For example, on his initial indigency form, he marked “0” when prompted to disclose his equity in real estate. However, this form failed to detail the value of the couple’s vehicles; Christensen merely wrote “not owned clear” when prompted to disclose the type of vehicle and its value. In its totality, the earlier indigency form does not clearly demonstrate the circuit court erred in concluding that funds might have been available to pay for an attorney had Christensen contested his divorce.

Christensen still failed to substantiate with documentation any of his assertions regarding the actual disposition of the couple's marital property.

¶18 Finally, Christensen challenges the relevancy of the circuit court's finding of voluntary impoverishment, asserting that the reason for his indigency is irrelevant. We disagree, because a circuit court's inherent authority to appoint counsel requires a balancing of numerous factors, including seemingly intangible concepts like "public justice" and "sound policy." See *Kennedy*, 315 Wis. 2d 507, ¶10. Importantly, these concepts can reasonably be construed as permitting the circuit court to consider the apparent injustice of burdening the taxpayers with funding Christensen's attorney appointment because he voluntarily divested himself of assets and income.

¶19 Christensen cites no authority for the notion that the circuit court may not consider a defendant's efforts to divest him or herself of assets and income. The circuit court is obligated to "consider all relevant information submitted, on a case-by-case basis, to decide whether the defendant truly is indigent and whether counsel should be appointed." *Id.*, ¶27. The court's finding that Christensen had "voluntarily impoverished" himself is critical here, because it necessarily implies Christensen had the funds to pay for private counsel, but he simply decided to otherwise allocate the funds.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

